

LAI SIN FAH

a

v.

TAN KUI LIM

HIGH COURT BORNEO

GEORGE SEAH J

[CIVIL APPLICATION NO. K. 24 OF 1978]

b

7 APRIL 1979

FAMILY LAW: *Children - Adoption of infant by maternal grandmother - Whether proper - Adoption Ordinance (Cap 91) (Sarawak), s. 6(3).*

This was a case wherein the grandmother adopted her maternal grandson, *ie*, the infant son of the respondents. The adoption was made under the proviso to s. 6(3) of the Adoption Ordinance (Cap 91) Sarawak. In this instance, the applicant, the brother of the 2nd respondent, applied to have the said adoption declared void and of no effect.

c

Held:

Under the proviso to s. 6(3) of the Adoption Ordinance, the child has to be adopted in accordance with the custom of the race to which the adopting parents belong or belonged. Here it has to be in accordance with the Hakka custom practised and recognised in Sarawak. The said custom does not recognise such an adoption.

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[Adoption null and void and of no effect.]

Case referred to:

Lai Sin Fah v. Tan Kui Lim and Anor. [1980] 1 MLJ 222

e

Legislation referred to:

Adoption Ordinance (Cap 91) (Sarawak), s. 6(3)

For the petitioner - John Lee

For the respondents - Goh Leng Chua (A. Liew with him)

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JUDGMENT**George Seah J:**

This is an application by Lai Sin Fah for an order declaring an adoption registered on 21 March 1977 at the District Office, Kuching, Sarawak to be void and of no effect. The application is opposed by both the respondents, Tan Kui Lim and Lai Joon Nyiat (f).

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I have read the affidavits of the applicant, Lai Sin Fah as well as the affidavits of the respondents Tan Kui Lim and Lai Joon Nyiat (f) and I find the following facts to be not in dispute:

- a) Both the applicant, Lai Sin Fah and the second respondent, Lai Joon Nyiat (f) are brother and sister. The said Lai Joon Nyiat (f) is the wife of the first respondent, Tan Kui Lim.
- b) The late Chang Shok Moi alias Chang Say Moi or Chang Kok (f) was the mother of the applicant and the second respondent. The name of the father of the applicant and the second respondent was Lai Kee, deceased. The late Lai Kee died many years ago but the late Chang Shok Moi (f) died intestate on 1 October 1977 in Kuching.

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According to the first respondent, Tan Kui Lim; his wife Lai Joon Nyiat (f) gave birth to a son prior to 1977 and he was named Tan Ten Chew. After the birth, he and his wife verbally agreed with the late Chang Shok Moi (f) that the latter could have the said infant as her

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- a* own son. It was conceded that no customary rite was conducted to ratify this oral agreement. However, in February 1977 the late Chang Shok Moi (f) instructed her advocate to make an application to the District Office, Kuching to have the said Tan Ten Chew formally adopted and registered under the Adoption Ordinance (Cap. 91). At the District Office, the registration clerk had doubts, in view of the oral agreement aforesaid, to treat the matter as one of late registration under the Ordinance. The clerk then referred the matter to the Resident, First Division.
- b* An informal interview was held in the office of the said Resident and no affirmation or oaths were administered to both the respondents and the late Chang Shok Moi (f). The Resident was satisfied that both the respondents had consented to the late Chang Shok Moi (f) adopting the said Tan Ten Chew as her son and that the late Chang Shok Moi (f) had the financial means to support the said child. Having satisfied these the Resident then directed the District Officer to register the said adoption under the proviso to s. 6(3) of the Adoption Ordinance.
- c*

Section 6 reads:

- d* 6(1) Any person who belongs to the Chinese race or professes the Muslim faith and purports to adopt a child in Sarawak, and any person as aforesaid who is domiciled in Sarawak or elsewhere, shall register such adoption in the manner specified in this Ordinance.
- e* (2) Any person of the Chinese race or professing the Muslim faith who adopts a child and fails in contravention of subsection (1) to apply within twelve months for registration of such adoption shall be guilty of an offence: Penalty, imprisonment for 6 months or a fine of RM1,000.
- f* (3) Except as is provided by ss. 9 and 11 (which are not relevant here) the adoption of a child by persons of the Chinese race or professing the Muslim faith shall be void unless registered in accordance with the provisions of this Ordinance:
- g* Provided that a Court of a Magistrate of the first class constituted by the Resident may, on the application of a Magistrate, probate officer or interested party, direct a district officer to register an adoption if it is satisfied that the child has been adopted in accordance with the custom of the race to which the adopting parents belong or belonged, and the fact that one or both of the adopting parents are dead shall be no bar to such registration notwithstanding the provisions of s. 3.

- h* It seems to me that when the Resident, First Division directed the district officer, Kuching to register the adoption of the infant Tan Ten Chew by the late Lai Kee and Chang Shok Moi alias Chang Say Moi or Chang Sok (f) (deceased), he purported to act under the proviso to sub-section 3 of s. 6 of the Adoption Ordinance. It is plain that when the Resident interviewed the natural parents of Tan Ten Chew and the adopting parent, the late Chang Shok Moi (f) he was only concerned with 2 matters, viz. (a) whether the natural parents had given their unequivocal consent to the adoption and (b) whether the adopting parent was financially capable of maintaining the adopted child.
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- j* With due respect to the Resident, First Division, when an application is made under the proviso to s. 6(3) of the Adoption Ordinance, the principal matter he had to be satisfied is whether the child had been adopted in accordance with the custom of the race to which the adopting parents belong or belonged. In other words, was the Resident satisfied that the adoption of the child Tan Ten Chew, as son of the respondents Tan Kui Lim (m) and Lai Joon Nyiat (f) by the late Lai Kee and Chang Shok Moi (f) (deceased) in accordance with Hakka custom practised and recognised in Sarawak?

- k* During the interview with the natural parents of the child and the adopting parent, it seems to me that the Resident did not direct his mind to the vital question which he had to be satisfied under the proviso to s. 6(3) of the Adoption Ordinance. Nevertheless the question

I have to consider is whether Tan Ten Chew had been adopted in accordance with the Hakka customary laws as practised and recognised in Sarawak.

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I will first of all consider the expert testimony of Lam Chun Ngin of 18 Carpenter Street, Kuching, as stated in an affidavit dated 18 January 1979.

Lam says that he has been a registrar of Chinese marriages for the Hakka community in the district of Kuching for the last 22 years, and that he came to Sarawak from the province of Canton in 1921. According to Lam, the Chinese/Hakka custom of adoption of a child in Sarawak is as follows:

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- a) In the case of agnates (relatives whose kinship is traceable males) to select from the generation immediately below the adopter and the individual to be adopted must hold in the family tree the same position, relative to common ancestor, after as before adoption. It is contrary to the order of nature or generation either above or below that grade should be selected.
- b) This custom applies equally to adoption of cognates (persons related to another on the mother's side.)

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It therefore follows that a maternal grandson cannot be adopted as a son of a maternal grandparent. And during the funeral ceremony of a Chinese deceased, sons wear white sackcloth as mourning dresses and maternal grandsons wear blue ones. It is also customary to read out a list of recognised descendants which is then burnt at the ceremony or published in the newspapers. The colour of the mourning dress worn by a person during the funeral ceremony of his parent or grandparent is to distinguish his or her status or relationship with the deceased.

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Next, I will touch on the expert testimony of Liong Kim Chong of 7th Mile Bazaar, Kuching. Liong claims that he has been a Kapitan China of the 7th Mile area, Kuching for the past 25 years and he too came to Sarawak from Canton province in 1937. His view is substantially the same as that of Lam Chun Ngin. However, Liong adds that a grandnephew can be adopted as a grandson or a maternal grandson but not as a son. Liong was present and helped in the funeral ceremony of the late Chang Shok Moi (f) on 2 October 1977. He noticed that the applicant, Lai Sin Fah wore white sackcloth while the infant Tan Ten Chew wore blue one as mourning dress; whereas the applicant was described as deceased's son while the infant was described as deceased's maternal grandson in the list of recognised descendants read out by a monk during the funeral ceremony. This list was burnt immediately after it had been read out (see Ex.JL2).

*e**f*

I am prepared to accept Lam Chun Ngin and Liong Kim Chong as experts in Chinese/Hakka customary laws relating to adoption as practised and recognised in Sarawak. Based on their expert testimony, I hold that in Sarawak, a maternal grandson cannot be adopted as a son of a maternal grandparent or grandparents. It follows from this finding that the adoption of the infant Tan Ten Chew by the late Lai Kee (m) and Chang Shok Moi (f) (deceased) and registered at the District Office, Kuching on 21 March 1977 as their son was not made in accordance with the Chinese/Hakka custom as practised and recognised in Sarawak, and that the Resident, First Division, was wrong to direct the said District Officer to register the said adoption.

*g**h*

Since the respondents have not adduced any expert testimony to the contrary, I therefore declare the adoption of Tan Ten Chew and registered at the District Office, Kuching on 21 March 1977 to be null and void and of no effect.

I will hear argument as to costs of this proceeding.

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